Kilang Papan Pulau Sebang Sdn Bhd v Lim Trading & Co

HIGH COURT (SEREMBAN) — CIVIL APPEAL NO 12–64 OF 2002
LOW HOP BING J
20 SEPTEMBER 2004

Civil Procedure — Time — Extension of — Filing of notice and memorandum of appeal — Order of Rules of High Court wrongly cited — Whether fatal to application — Rules of the High Court 1980 O 3 r 5(1)

Civil Procedure — Time — Extension of — Filing of notice and memorandum of appeal — Delay in obtaining notes of evidence and grounds of decision — Unsatisfactory explanation for delay — Nothing to indicate merits of plaintiff's appeal — Whether extension should be granted

The defendant applied pursuant to O 5 r 1 of the Rules of the High Court 1980 for an order that an extension of time be granted to the appellant to file the memorandum and record of appeal. The defendant's counsel claimed he had, on 24 April 2003, received from the court a notice that the notes of evidence and the grounds of judgment ('the documents') were ready for collection but only managed to collect them from the judge's secretary on 9 June 2003 as the secretary was away on leave and due to his own marriage leave. There was a delay of two months and one day, and one month and four days in filing the memorandum and record of appeal respectively.

Held, dismissing the application with costs:

(1) Order 5 r 1 which forms the foundation of the defendant's application was not even remotely relevant to the defendant's avowed purpose in filing this application for an order for extension of time. That being the case, the defendant's application was devoid of any basis whatsoever. However, the court proceeded to decide on its merits (see paras 6 and 8).

(2) There was no explanation as to why upon receiving the notice from the court on 24 April 2003, the defendant's counsel had chosen to wait for a period of 14 days until 8 May 2003 to collect the documents from the judge's secretary who had by then gone on a course until 13 May 2003. There was also an unexplained delay and inaction on the part of the counsel to delegate the duty to collect the documents while he was on his marriage leave. This lackadaisical and lacklustre attitude leaves a lot to be desired (see paras 18–19).

(3) Although the defendant's counsel submitted that his delay had caused no prejudice to the respondent, there was nothing in the affidavit or in his

submission to indicate any merits in the defendant's appeal, as this was one of the factors which may be considered in order to assist the court in the exercise of discretion and may tilt the balance in favour of the defendant under O 3 r 5(1) (see para 20).

[Bahasa Malaysia summary

Defendan membuat permohonan di bawah A 5 k 1 Kaedah-kaedah Mahkamah Tinggi 1980 untuk satu perintah perlanjutan masa untuk memfailkan memorandum dan rekod rayuan. Peguam defendan mengatakan bahawa beliau pada 24 April 2003 telah menerima satu notis dari mahkamah bahawa nota keterangan dan alasan penghakiman ('dokumen tersebut') telah sedia untuk kutipan tetapi beliau hanya dapat mengambil dokumen tersebut dari setiausaha hakim pada 9 Jun 2003 kerana setiausaha tersebut sedang bercuti dan beliau sendiri juga akan mengambil cuti perkahwinan. Terdapat kelewatan selama dua bulan dan empat hari dalam memfailkan memorandum dan rekod rayuan.

Diputuskan, menolak permohonan dengan kos:

(1) Aturan 5 k 1 yang menjadi dasar kepada permohonan defendan tidak pun relevan sama sekali dengan tujuan defendan memfailkan permohonan untuk perintah perlanjutan masa. Oleh yang demikian, permohonan defendan tidak mempunyai sebarang asas sama sekali. Walau bagaimanapun, mahkamah meneruskan membuat keputusan berdasarkan merit (lihat perenggan 6 dan 8).

(2) Tiada sebarang penjelasan kenapa apabila menerima notis dari mahkamah pada 24 April 2003, peguam defendan memilih untuk menunggu selama 14 hari sehingga 8 Mei 2003 untuk mengambil dokumen tersebut dari setiausaha hakim yang mana pada ketika itu telah pun pergi berkursus sehingga 13 Mei 2003. Terdapat juga kelewatan yang tidak dijelaskan dan ketiadaan tindakan pada pihak peguam menugaskan kerja untuk mengambil dokumen tersebut semasa beliau sedang mengambil cuti perkahwinan. Sikap acuh tidak acuh dan tidak endah ini adalah tidak memuaskan (lihat perenggan 18–19).

(3) Walaupun peguam defendan menghujahkan bahawa kelewatannya tidak menyebabkan sebarang prejudis kepada responden, tiada apapun di dalam afidavit atau di dalam penghujahannya yang menunjukkan sebarang merit di dalam rayuan defendan, oleh kerana ini adalah satu dari faktor yang mungkin dipertimbangkan dalam membantu mahkamah menggunakan budi bicaranya dan mungkin menyondong imbangan menyebelahi defendan di bawah A 3 k 5(1) (lihat perenggan 20).]

Notes

For cases on extension of time, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 6334–6370.

Cases referred to

Beauford Baru Sdn Bhd v Gopala Krishnan a/l VK Gopalan [2002] 6 MLJ 134 refd
Feedmeal Malaysia Sdn Bhd v Teh Cho Yeow & Ors [2003] 6 MLJ 19 refd

Scott & English (M) Sdn Bhd v Leikie Refrigeration & Stainless Steel Industries Sdn Bhd & Ors [1994] 2 MLJ 424 refd

Legislation referred to
Rules of the High Court 1980 O 3 r 5(1), O 5 r 1

Appeal from: Summons No 52–316 of 1993 (Sessions Court, Seremban)

[*Editorial Note*: This case supersedes the previous publication of the same in [2005] 1 MLJ 753.

Lim Kem Thuan (Lim Kem Thuan & Co) for the plaintiff/respondent.
Asmawi Ismail (SF Leow & Co) for the defendant.

Low Hop Bing J:

APPLICATION

[1] Before me is the application by way of summons in chambers *vide* encl 7 filed by the defendant/appellant ('the defendant') pursuant to O 5 r 1 of the Rules of the High Court 1980 ('O 5 r 1') for an order that extension of time be granted to the appellant to file the memorandum and record of appeal, in furtherance of the appeal lodged by the defendant against whom judgment in the sum of RM77,050 with interest at 8% pa from the date of summons, ie 24 August 1993 to the date of realization and costs had been entered and whose counterclaim has been dismissed with costs.

Order 5 rule 1

[2] Mr Lim Kem Thuan, counsel for the plaintiff/respondent submitted, inter alia, that this application is baseless and misconceived.

[3] Mr Asmawi Ismail, counsel for the defendant, in his written submission reaffirmed his reliance on O 5 r 1 as the basis of this application, thereby confirming his belief and conviction that he was undoubtedly seeking support from the provisions of O 5 r l and urging the court to consider his application in this light.

[4] In the circumstances, it is necessary and advisable for me to consider and determine this application on the basis on which the defendant has presented it.

[5] Order 5 r 1 merits reproduction as follows:

1 Mode of beginning civil proceedings (O 5 r 1)

Subject to the provisions of any written law and of these rules, civil proceedings in the High Court may be begun by writ, originating summons, originating motion or petition.

[6] Order 5 r 1 which forms the foundation of the defendant's application provides specifically and clearly for the mode of commencing civil proceedings in the High Court and is not even remotely relevant to the defendant's aforesaid avowed purpose in filing this application, ie for an order for extension of time to enable the defendant to file the memorandum and record of appeal.

[7] Any reasonably competent counsel would know that for the purposes of obtaining an order for extension of time, he must invoke O 3 r 5(1) which reads:

> 5 Extension, etc of time (O 3 r 5)
>
> (1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these rules or by any judgment, order or direction, to do any act in any proceedings.

[8] Order 5 r 1 is therefore singularly inapplicable. That being the case, the defendant's application is devoid of any basis whatsoever.

[9] An advocate and solicitor such as the defendant's learned counsel is reasonably expected to exercise a reasonable standard of professional skill in the conduct of his professional practice. Such standard would plainly and obviously include the citation of and reliance on the correct procedural law in order not to render the application baseless or misconceived.

[10] In *Feedmeal Malaysia Sdn Bhd v Teh Cho Yeow & Ors* [2003] 6 MLJ 19 at p 25E, where both counsels relied upon outdated procedural law, I observed as follows:

> The ongoing exercise of keeping abreast and updating oneself with the latest development in the law is a virtue and indeed a second nature of an advocate and solicitor, especially in one's early professional practice, so that a sound starting point may be established in order to enhance one's competence in and to eradicate one's ignorance of the law.

[11] Be that as it may, the hearing and determination of this application would certainly be incomplete if I do not proceed to decide on its merits, which I shall do now.

MERITS

[12] The defendant's affidavit in support was affirmed by defendant's counsel. In essence, it stated that his law firm had on 24 April 2003 received from the court a notice that the notes of evidence and the grounds of judgment ('the documents') were ready for collection.

[13] On 8 May 2003, he went to court to obtain those documents from the secretary to the sessions court judge but was asked to wait as the secretary had to attend a course in Kelantan from 8 to 13 May 2003.

[14] From 14 to 23 May 2003 (Friday), he was on his marriage leave and went to court on 26 May 2003 but had to wait as the secretary had gone to Kluang to attend another course from 25 May to 7 June 2003 (Saturday).

[15] He managed to obtain the documents on Monday, 9 June 2003 but the time prescribed for filing the memorandum and record of appeal had lapsed, and there was a delay of two months and one day, and one month and four days respectively.

[16] In his submission, he relied on my judgment in *Beauford Baru Sdn Bhd v Gopala Krishnan a/l VK Gopalan* [2002] 6 MLJ 134 where I granted an extension of time to file the notice of appeal against the decision in respect of liability as assessment of damages had yet to be determined, in which case no prejudice was occasioned to the respondent therein. The facts and circumstances there were clearly distinguishable from those in the instant application.

[17] Order 3 r 5(1) confers upon this court the power to extend the period within which a person such as the defendant is required by these rules to do any act in any proceedings. This power is to be exercised by way of discretion. It is a judicial discretion and, not being an unprincipled discretion, must be exercised in accordance with established judicial principles, having regard to all the facts and circumstances of each particular case.

[18] The affidavit in support and the submission presented for the defendant showed a delay of two months and one day and one month and four days in filing the memorandum and record of appeal respectively. There was no explanation as to why upon receiving the notice from the court on 24 April 2003, the defendant's counsel had chosen to wait for a period of 14 days until 8 May 2003 to collect the documents from the secretary who had by then gone on the course until 13 May 2003.

[19] There was also an unexplained delay and inaction on the part of the said counsel to delegate the duty to his litigation clerk to collect the documents from the secretary from 14 to 23 May 2003 when the counsel had to go on his marriage leave. There is no law imposing a specific duty on the counsel to personally collect the documents. It was unfortunate that the counsel's predicament was solely brought about by him as he appears to have attempted to collect the documents on those dates when the secretary was, by a curious coincidence, away attending courses. This lackadaisical and lacklustre attitude leaves a lot to be desired.

[20] Although the defendant's counsel submitted that his delay has caused no prejudice to the respondent, there was nothing in the affidavit or in his submission to indicate any merits in the defendant's appeal, as this is one of the factors which may be considered in order to assist the court in the exercise of discretion and may tilt the balance in favour of the defendant under O 3 r 5(1) (see the judgment of

Chong Siew Fai J (later CJ (Sabah & Sarawak)) in *Scott & English (M) Sdn Bhd v Leikie Refrigeration & Stainless Steel Industries Sdn Bhd & Ors* [1994] 2 MLJ 424 (HC); and my judgment in *Beauford*).

CONCLUSION

[21] On the foregoing grounds, I am unable to exercise my discretion in favour of the defendant. I therefore dismiss this application with costs.

Application dismissed.

Reported by Loo Lai Mee